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# Supreme Court of the United States

**OCTOBER TERM, 1939.**

**No. 597**

THE WESTERN UNION TELEGRAPH COMPANY,
a corporation,
*Petitioner,*

*vs.*

PAUL NESTER and JUAN CHARLES, copartners,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR PETITIONER

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# INDEX.


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| QUESTION PRESENTED | 2 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| SPECIFICATIONS OF ERRORS TO BE URGED | 4 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT: | |
| I. The limitation of liability provision in petitioner's tariff is not a provision for liquidated damages | 5 |
| A. The valuation clause in the limitation of liability provision is a declared value upon which the rate is based; as such it fixes a maximum limit of liability within which recovery may be had for damages actually sustained | 5 |
| B. The construction given to the provision in question by the court below renders nugatory the major part of the provision, and, is, therefore, repugnant to the rule that, if possible, a construction will be adopted which gives effect to all the terms of the provision | 16 |
| C. The construction given to the provision in question by the court below is untenable because directly contrary to the intent of the parties | 18 |

PAGE

D. The construction given to the provision in question by the court below is repugnant to the rule that where one possible construction of a tariff will make it valid, and another construction will render it invalid, the former construction will be adopted ..... 19

E. The courts below misconstrued and misapplied the decisions of this court in *Western Union Telegraph Co.* v. *Czizek* (1924) 264 U. S. 281, and *Sun Printing & Publishing Assn.* v. *Moore* (1902) 183 U. S. 642 ..... 24

II. Even if it could be assumed that the court below was correct in its ruling that the provision in question was intended as one for liquidated damages, it nevertheless should not have enforced the provision until its validity, as so construed, had been passed upon by the Federal Communications Commission ..... 26

III. The judgment cannot be sustained on the theory that plaintiffs proved an actual loss of $500 or more ..... 27

APPENDIX A ..... 31

APPENDIX B ..... 37

## TABLE OF CASES.


| | PAGE |
|---|---|
| *Adams Express Co.* v. *Croninger* (1913) 226 U. S. 491 | 6n |
| *Atkins* v. *The Disintegrating Company.* (1873) 18 Wall. 272, 305-306 | 11n |
| *Atlantic Bridge Co.* v. *Atlantic Coast Line R. Co.* (S. D. Fla., 1932) 56 F. (2d) 163, 166 (affirmed, 57 F. (2d) 654) | 16n |
| *Barrett* v. *Van Pelt* (1925) 268 U. S. 85, 92 | 27 |
| *Bertuch* v. *U. S. Hayti Tel. & Cable Co.*, 79 Misc. 10 | 29n |
| *Davenport* v. *Western Union Telegraph Co.* (1932) 91 Mont. 570, 9 P. (2d) 172 | 10n |
| *Davis* v. *Prairie Pipe Line Co.* (8th C. C. A., 1924) 298 F. 393, 397 | 16n |
| *Dowling* v. *Western Union Telegraph Co.* (1st C. C. A., 1937) 92 F. (2d) 864, 865 | 10n |
| *Empire Refining Co.* v. *Davis* (E. D. Okla., 1925) 6 F. (2d) 305, 306 | 16n |
| *Ewing* v. *Howard* (1868) 7 Wall. 499 | 23n |
| *Ferrerro* v. *W. U.* (1896) 9 App. D. C. 455, 35 L. R. A. 548 | 29n |
| *Fitch* v. *Western Union*, 150 Mo. App. 149, 130 S. W. 44 | 29n |
| *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, decided January 2, 1940, No. 129, October Term, 1939 | 26 |
| *Great Northern Ry.* v. *Delmar Co.* (1931) 283 U. S. 686, 690-691 | 23 |
| *Hobbs* v. *McLean* (1886) 117 U. S. 567 | 23n |
| *Hygrade Food Products Corp.* v. *Chicago, M., St. P. & P. R. Co.* (S. D. N. Y., 1935) 10 F. Supp. 767, 770 (reversed on other grounds, 85 F. (2d) 113) | 16n |

PAGE

*Ingram* v. *Hughes* (1933) 170 S. C. 1, 169 S. E. 425.. 11n
*Intermountain Building & Loan Ass'n* v. *Gallegos* (9th C. C. A., 1935) 78 F. (2d) 972, 981 ..... 23n

*Jacobs* v. *Western Union Telegraph Co.* (1917) 196 Mo. App. 300, 196 S. W. 31 ..... 11n

*Kerr S. S. Co.* v. *Radio Corporation* (1927) 245 N. Y. 284, 55 A. L. R. 1139..... 29n
*Klotz* v. *Western Union Telegraph Co.* (1920) 187 Iowa, 1355, 175 N. W. 825, 831 ..... 10n
*Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226 .....18n, 19, 21n, 22n

*Legault* v. *Board of Trustees* (1911) 161 Cal. 197.. 11
*Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541.....14, 14n, 20
*Lynch* v. *Western Union Telegraph Co.* (1929) 224 Mo. App. 50, 18 S. W. (2d) 535 ..... 11n

*Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 522-523, 178 S. E. 764....11, 12, 22, 22n, 23n

*Naive-Spillers Corp.* v. *Postal Telegraph-Cable Co.*, 4 Tenn. App. 435 ..... 11n
*Newsome* v. *Western Union*, 153 N. C. 153, 69 S. E. 10 29n
*Nolte Brass Foundry Co.* v. *Western Union Telegraph Co.* (D. C. Ohio, 1930) 38 F. (2d) 838, 841.. 10n
*N. Y. Central Securities Co.* v. *U. S.* (1932) 287 U. S. 12, 24 ..... 15n

*O'Brien* v. *Miller* (1897) 168 U. S. 287, 297 ..... 17n

*Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.* (8th C. C. A., 1928) 25 F. (2d) 66, 69 ..... 17n
*Postal Telegraph & Cable Co.* v. *Wells* (1903), 82 Miss. 733, 35 So. 190, 192 ..... 7n

PAGE

*Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minnesota* (8th C. C. A., 1903) 121 F. 609, 611 ..... 17n
*Primrose* v. *Western Union Telegraph* (1894) 154 U. S. 1 ..... 6, 6n, 7, 28n, 29n

*Railroad Company* v. *Lockwood* (1873) 17 Wall. 357, 384 ..... 5n

*San Giorgio I* v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496-497 ..... 5n, 9
*Sasinowski* v. *Boston & M. R. R.* (1st C. C. A., 1935) 74 F. (2d) 628, 633 ..... 17n
*S. E. Express Co.* v. *Pastime Co.* (1936) 299 U. S. 28 ..... 9n, 15n
*Sun Printing & Publishing Assn.* v. *Moore* (1902) 183 U. S. 642, 662, 668, 673 ..... 18n, 24, 25

*Thayer* v. *Western Union Telegraph Co.* (1937) (Mass. Advance Sheets, 1937, 215) 6 N. E. (2d) 821 10n
*Tyson* v. *Moore* (5th C. C. A., 1937) 92 F. (2d) 741 .. 23n

*United States* v. *Bethlehem Steel Co.* (1907) 205 U. S. 105, 118, 119 ..... 18n
*United States* v. *Chicago North Shore R. Co.* (1933) 288 U. S. 1, 13-14 ..... 15n
*United States* v. *United Engineering Co.* (1914) 234 U. S. 236, 241 ..... 18n, 21n
*Unrepeated Message Case*, 44 I. C. C. 670, 675-676 ..... 13, 13n, 20
*Updike Grain Corporation* v. *St. Louis & S. F. Ry. Co.* (8th C. C. A., 1931) 52 F. (2d) 94, 96 ..... 16n

*Waters* v. *Western Union Telegraph Co.* (1927) 194 N. C. 188, 138 S. E. 608, 611 ..... 10n
*Wernick* v. *Western Union Telegraph Co.* (1937) 290 Ill. App. 569, 9 N. E. (2d) 72 ..... 11, 23n

PAGE

*Western Union Telegraph Co.* v. *Anderson* (Tex. Civ. App., 1922) 245 S. W. 731, 732 ..... 20n
*Western Union Telegraph Co.* v. *Czizek* (1924) 264 U. S. 281, 283, 284-285 ..... 8n, 9, 24, 24n, 25, 25n
*Western Union Telegraph Co.* v. *Downs* (1929) 178 Ark. 933, 12 S. W. (2d) 887 ..... 10n
*Western Union Telegraph Co.* v. *Eckhardt* (Tex. Civ. App., 1927) 2 S. W. (2d) 505, modified and affirmed (Tex. Comm. App., 1929) 11 S. W. (2d) 777 ..... 10n
*Western Union Telegraph Co.* v. *Esteve Bros.* (1921), 256 U. S. 566 ..... 7, 8, 9, 13
*Western Union Telegraph Co.* v. *Geo. F. Fish, Inc.*, (1925) 148 Md. 210, 129 Atl. 14 ..... 11n
*Western Union Telegraph Co.* v. *Halbert* (1921) 124 Miss. 214, 86 So. 760, 761 ..... 10n
*Western Union Telegraph Co.* v. *Hall* (1923) 287 F. 297 ..... 29n
*Western Union* v. *Hogue*, 79 Ark. 33, 94 S. W. 924 ..... 29n
*Western Union Telegraph Co.* v. *Jacobs* (1926) 115 Tex. 240, 246, 280 S. W. 733 ..... 10
*Western Union Telegraph Co.* v. *Lee* (1917) 174 Ky. 210, 192 S. W. 70 ..... 11n
*Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252 ..... 7, 8, 8n, 9, 13, 24n, 25
*Western Union Telegraph Co.* v. *Schriver* (8th C. C. A., 1905) 141 Fed. 538 ..... 11n
*Western Union Telegraph Co.* v. *Sharp* (Tex. Civ. App., 1928) 5 S. W. (2d) 567) ..... 10n
*Western Union Telegraph Co.* v. *T. C. Davis Cotton Co.* (1926) 170 Ark. 506, 280 S. W. 977, 979 ..... 10n
*Wheelock* v. *Walsh Fire Clay Products Co.* (8th C. C. A., 1932) 60 F. (2d) 415, 417-418 ..... 17n
*Williams* v. *Western Union Telegraph Co.* (1925) 218 Mo. App. 364, 275 S. W. 570, 572 ..... 10n
*Wise* v. *United States* (1919) 249 U. S. 361, 362, 365 .. 18n, 21n

## Authorities Cited


Statutes: PAGE

Communications Act of 1934:

Section 201; 48 Stat. 1070; U. S. C. 47:201 ..... 19

Interstate Commerce Act:

Act of June 18, 1910, c. 309, § 7, 36 Stat. 544: U. S. C. 49:1 ..... 8n, 12, 13

Judicial Code:

Section 240(a) ..... 1

Textbooks:

35 A. L. R. 336 ..... 6n
24 Cornell L. Q. 601 ..... 5n
62 C. J. 171, 177 ..... 6n
62 C. J. 230, 231, notes 63, 66 ..... 28n, 29
52 Harvard Law Review 839 ..... 5n
3 Hutchinson on Carriers, ¶¶ 1360, 1367, 1368, 1370 29n
11 L. R. A. (N. S.) 561 ..... 6n
26 R. C. L. 570 ..... 6n

Restatement of the Law of Contracts:

Sec. 575 (2) ..... 9
Sec. 575 (1) ..... 6n

88 U. Pa. L. Rev. 224 ..... 5n

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR PETITIONER

### Opinions Below

The opinion of the circuit court of appeals (R. 144) is reported at 106 F. (2d) 587. The district court rendered two opinions (R. 21, 39), both of which are reported at 25 F. Supp. 478.

### Jurisdiction

The judgment of the circuit court of appeals was entered September 15, 1939 (R. 159). A timely petition for rehearing was denied November 27, 1939 (R. 159). The petition for certiorari was filed December 18, 1939, and was granted January 29, 1940. The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Question Presented

Is the limitation of liability provision in petitioner's money order tariff a liquidated damage provision which automatically makes petitioner liable for damages in the fixed sum of $500 in each case of default in service, regardless of whether or not the sender has sustained any actual damage, or is the provision one fixing a maximum limit within which damages may be proved?

## Statutes Involved

The statutes involved are set forth in Appendix A to this brief.

## Statement of the Case

On September 1, 1937, respondent Nester paid petitioner, at Los Angeles, California, $150 to be transmitted to respondent Charles, his partner, at Aramecina, Republic of Honduras (R. 45). By mistake of one of petitioner's employees, the money was sent to British Honduras instead of to the Republic of Honduras and was not paid to Charles (R. 45-46).

One of the provisions of petitioner's money order tariff, pursuant to which the money was sent, was the following (R. 46):

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars, at which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued, UNLESS a greater value is stated in writing on the face of the application and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

This provision was part of a schedule of charges, or tariff, which petitioner had filed with the Interstate Commerce Commission on March 9, 1932, and which, under the provisions of the Communications Act of 1934 (Appendix A, p. 35), was transferred to the files of the Federal Communications Commission and remained in force after the enactment of that Act (R. 119).

Respondents brought this action against petitioner and one of its employees[1] to recover special damages in the sum of $7,600 claimed to have been suffered by reason of the nonpayment of the money (R. 2, 6-8). Petitioner answered, denying that respondents had suffered any damage (R. 12), and, as a separate defense, pleading that under the above provision in the money order tariff petitioner, in any event, would not be liable beyond the sum of $500 (R. 12-16).

At the conclusion of the trial (a jury having been waived, R. 20), the district court held that respondents had failed to prove that they had suffered any damage by reason of the nonpayment of the money (R. 24-25). Nevertheless, the court directed the entry of judgment against petitioner for $500, on the ground that the above-quoted provision in the money order tariff is "a provision for liquidated damages which entitled the sender to recovery of the minimum amount of five hundred dollars *in the absence of any proof [of damages] or without any offer of proof*" (R. 26).[2] This ruling was directly opposed to the allegations and prayer of the complaint and to the theory on which the case had been brought and tried (R. 27-28); it was made by the court on its own motion, the point not having been raised by either of the parties. Petitioner objected to proposed findings based upon the ruling (R. 35-36), but the court overruled these objections (R. 39) and, in a supplementary opinion, adhered to its conclusion (R. 39-43).

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[1] The action was dismissed as to the employee (R. 50).

[2] Emphasis by italics is ours throughout the brief, unless otherwise noted.

The circuit court of appeals affirmed the judgment of the district court (R. 158). Judge WILBUR dissented (R. 151).

## Specifications of Errors to be Urged

The circuit court of appeals erred:

1. In holding that the limitation of liability provision in petitioner's money order tariff is a provision for liquidated damages.

2. In holding that respondents are entitled to recover $500 from petitioner in the absence of proof of actual damages in any amount.

## Summary of Argument

1. The valuation clause in the limitation of liability provision is not a provision for liquidated damages. It is a declaration of value upon which the rate is based, made in conformity with the common law rule applicable to limitation-of-liability provisions in the tariffs of common carriers and other public service companies. As such it fixes the maximum—not the absolute—liability in case of loss.

2. Even if it could be assumed that the court below was correct in its ruling that the provision in question was intended as one for liquidated damages, the court nevertheless should not have enforced the provision until its validity, as so construed, had been passed on by the Federal Communications Commission.

3. The judgment cannot be sustained on the theory that plaintiffs proved an actual loss of $500.00 or more.

## ARGUMENT

### I

**The limitation of liability provision in petitioner's tariff is not a provision for liquidated damages.**

**A. The valuation clause in the limitation of liability provision is a declared value upon which the rate is based; as such it fixes a maximum limit of liability within which recovery may be had for damages actually sustained.**

The courts below construed the limitation of liability provision in petitioner's tariff as "a provision for liquidated damages, which entitled the sender to recovery of the minimum amount of five hundred dollars in the absence of any proof [of damages] or without any offer of proof" (R. 26, 150-151). This ruling is clearly erroneous and in conflict with the uniform construction given to petitioner's tariff by every court, State and Federal, which has considered its provisions, and by the Interstate Commerce Commission.[3] A glance at the history of the provision in question and the reasons which led to its adoption will, we believe, make manifest the error of the courts below.

It has long been settled that a common carrier "cannot contract for relief from liability for his own negligence, even though he give a special consideration for an agreement to that effect."[4] And the general common law rule is that

> "A bargain for exemption from liability . . . for the consequences of negligence is illegal if
>
> . . . . . .
>
> (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence

[3] For general discussions of the decisions in the case at bar, we call attention to three recent case notes, two of them commenting adversely on the decision of the district court (52 Harv. L. Rev. 889; 24 Cornell L. Q. 601), and one commenting adversely on its affirmance by the circuit court of appeals (88 U. Pa. L. Rev. 224).

[4] *San Giorgio I* v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496; *Railroad Company* v. *Lockwood* (1873) 17 Wall. 357, 384.

in the performance of any part of its duty to the public for which it has received or been promised compensation.'"[5]

It is also settled, however, that a common carrier may limit its liability for negligence *to the amount of an agreed value*, if it maintains rates dependent upon the value declared in writing by the shipper.[6]

Early in the history of telegraphy the limitation provisions in appellant's tariffs were similar to those involved in *Primrose* v. *Western Union Telegraph* (1894) 154 U. S. 1, which we quote in the footnote.[7] These provisions did not contain a valuation of the message. Their validity was attacked in numerous cases, on the ground that telegraph companies could not limit their liability for damage resulting from negligence. A conflict of authority arose—some cases sustaining the limitation provisions; others holding them void.[8] When the question finally came before this court in the *Primrose* case, the court sustained the provisions. It held that telegraph companies "are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities" (154 U. S. 14); and it decided that the strict rule of the common law, applicable to common carriers, should not be applied to telegraph companies. The court referred to the common

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[5] Restatement of the Law of Contracts, sec. 575 (1).

[6] *Adams Express Co.* v. *Croninger* (1913) 226 U. S. 491.

[7] "[1st] * * * It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

[2d] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

[3d] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages" (154 U. S. 13).

[8] The cases are legion. See, generally, 62 C. J. 171, 177; 26 R. C. L. 570; 11 L. R. A. (N. S.) 561; 35 A. L. R. 336.

law rule, however, as an analogy, and sustained the provisions on the ground that they did not provide for a complete exemption from liability, but offered alternative limits of liability for alternative rates.

The decision of this court in the *Primrose* case, however, did not completely protect telegraph companies against the possibility of unlimited liability. Until 1910 telegraph companies were not subject to the Interstate Commerce Act. Their relations with their patrons were matters of contract, not subject to the statutory rule of equality and uniformity even when the transactions were interstate. Each State court, in telegraph cases coming properly before it, was free to adopt its own views as to the construction and validity of the provision for limitation of liability (*Western Union Telegraph Co.* v. *Esteve Bros.* (1921), 256 U. S. 566; *Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252), and a majority of the State courts continued to hold that the common law rule against limitation of liability for negligence was applicable—sometimes because the laws of the particular State declared telegraph companies to be common carriers—and pronounced the limitation invalid.[9]

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[9] See authorities referred to in footnote 8, supra. We quote from one case—the decision of the supreme court of Mississippi in *Postal Telegraph & Cable Co.* v. *Wells* (1903), 82 Miss. 733, 35 So. 190, 192—as illustrative:

> "Prior to the passage of our present Constitution, in 1890, the question of the power of telegraph companies to limit their liability for their own negligence was in doubt * * *. But the adoption of section 195, Const. 1890, in our judgment, removes all doubt as to what the true rule is in Mississippi. Section 195 declares that 'telegraph companies are common carriers in their respective lines of business, and subject to liabilities as such.' As common carriers, under the common law, any stipulation to exempt themselves from liability for their own negligence would be void, and the supreme court of this state has always held that no common carrier can restrict by contract the consequence of its own wrongdoing; * * *. The stipulations of the telegraph company here under consideration are simply an effort to contract for protection against the effect of its own wrongdoing—an attempt to limit its liability for its own negligence—and, as such, are invalid, as being opposed to public policy."

It was also generally held (before 1910) that the provision was invalid in cases of "gross" negligence.[10] Even after telegraph companies were brought under the Interstate Commerce Act,[11] so that the rule of equality and uniformity applied to all interstate and foreign messages (*Western Union Telegraph Co.* v. *Esteve Bros.* (1921), 256 U. S. 566; *Western Union Telegraph Co.* v. *Priester* (1928), 276 U. S. 252), the State courts were still free to apply their own rules with respect to *intrastate* messages, which constitute a considerable proportion of petitioner's business.

In this situation, under the compelling necessity to avoid the hazard of unlimited liability for a message costing only a few cents, petitioner added to its tariffs the provision now in question,[12] phrasing it strictly pursuant to the rule that:

> "A bargain by a common carrier or other person charged with a duty of public service *limiting to a reasonable agreed valuation the amount of damages*

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[10] Not until *Western Union Telegraph Co.* v. *Priester* (1928) 276 U. S. 252, did this court—resolving a conflict of decisions—finally decide that, with respect to interstate and foreign messages, the limitation provision is valid in cases of so-called "gross" negligence.

[11] By the Act of June 18, 1910 (36 Stat. 539, 544, et seq.). See p. 12, et seq., of this brief.

[12] Clause 2 of the message tariff was first adopted with a limitation of liability of $50.00. This clause is quoted in the opinion of this court in *Western Union Telegraph Co.* v. *Czizek* (1924), 264 U. S. 281, 283. It is, as the court below pointed out (R. 149), substantially identical with the money order tariff provision here involved, and reads as follows:

> "2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount *this telegram is hereby valued*, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof."

> *recoverable* for injury to property by a non-wilful breach of duty is lawful." [13]

This rule applies, of course, not only to injuries to property, but also to every kind of damage resulting from default in service.[14]

In the light of the foregoing considerations the meaning and intent of the provision in question are free from doubt. It is a provision by which a value is declared—not for the purpose of fixing an amount of liquidated damages—*but for the purpose of fixing the applicable rate*, and, at the same time, the *maximum* liability in case of default in service. It has so been construed and applied by this court. In *Western Union Telegraph Co.* v. *Czizek* (1924) 264 U. S. 281, 284-285, this court, speaking of the similar provisions in petitioner's message tariffs, said:

> "* * * as in fact it [the alleged negligence of the company] is that of servants, reasonable self-protection is allowed to the master against their neglects. One such self-protection sanctioned by the decisions is *a valuation of the message, with liberty to the sender to fix a higher value on paying more for it.*"

See also,

> *Western Union Telegraph Co.* v. *Esteve Bros. & Co.* (1921) 256 U. S. 566, 574, 575;
> *Western Union Telegraph Co.* v. *Priester* (1928) 276 U. S. 252, 259.

Such provisions have been uniformly construed as entitling the sender to recover only for actual loss or damage up to, but not beyond, the amount of the declared value.

See

> *San Giorgio I* v. *Rheinstrom Co.* (1935) 294 U. S. 494, 496-497 (quoted from in the dissenting opinion, R. 155-156).

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[13] Restatement of the law of Contracts, sec. 575 (2).

[14] *S. E. Express Co.* v. *Pastime Amusement Co.* (1936), 299 U. S. 28.

Illustrative of the rulings in the lower Federal and State courts is the language of the court in *Western Union Telegraph Co.* v. *Jacobs* (1926) 115 Tex. 240, 246, 280 S. W. 733:

> "* * * we hold that the stipulations pleaded are obligatory upon Jacobs, but that he is entitled to recover *his damages within the $50.00 valuation.*"

Similar rulings occur in many cases, a number of which we cite in the footnote.[15] In these and numerous other cases the courts have rendered decisions on the unquestioned assumption that recovery can be had only for damages actually sustained, up to the limit of the declared value;[16] *never* before has any court allowed a recovery except for actual loss.

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[15] *Williams* v. *Western Union Telegraph Co.* (1925) 218 Mo. App. 364, 275 S. W. 570, 572;
*Western Union Telegraph Co.* v. *T. C. Davis Cotton Co.* (1926) 170 Ark. 506, 280 S. W. 977, 979;
*Thayer* v. *Western Union Telegraph Co.* (1937) (Mass. Advance Sheets, 1937, 215) 6 N. E. (2d) 821;
*Waters* v. *Western Union Telegraph Co.* (1927) 194 N. C. 188, 138 S. E. 608, 611;
*Nolte Brass Foundry Co.* v. *Western Union Telegraph Co.* (D. C. Ohio, 1930) 38 F. (2d) 838, 841;
*Dowling* v. *Western Union Telegraph Co.* (1st C. C. A., 1937) 92 F. (2d) 864, 865;
*Klotz* v. *Western Union Telegraph Co.* (1920) 187 Iowa, 1355, 175 N. W. 825, 831;
*Western Union Telegraph Co.* v. *Halbert* (1921) 124 Miss. 214, 86 So. 760, 761.

[16] For examples, in addition to the decisions of this court above cited, see:
*Western Union Telegraph Co.* v. *Downs* (1929) 178 Ark. 933, 12 S. W. (2d) 887;
*Western Union Telegraph Co.* v. *Eckhardt* (Tex. Civ. App., 1927) 2 S. W. (2d) 505, modified and affirmed (Tex. Comm. App., 1929) 11 S. W. (2d) 777;
*Western Union Telegraph Co.* v. *Sharp* (Tex. Civ. App., 1928) 5 S. W. (2d) 567);
*Davenport* v. *Western Union Telegraph Co.* (1932) 91 Mont. 570, 9 P. (2d) 172;

(*Footnote continued on next page.*)

Although the earlier cases do not deal with the exact point decided in the case at bar, they nevertheless establish the correct construction of petitioner's tariff. It is "inconceivable," to use the language of the court in *Legault* v. *Board of Trustees* (1911) 161 Cal. 197, that, if the provision in question were a stipulation for liquidated damages, this court and the lower Federal and State courts would not "long ago have so declared and thus have done away with a vast amount of the argumentative reasoning in which [they have] indulged and which is and was entirely superfluous if the contention of appellant herein is sound."[17]

The exact question here involved has been raised in only two cases: *Wernick* v. *Western Union Telegraph Co.* (1937) 290 Ill. App. 569, 9 N. E. (2d) 72; and *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 178 S. E. 764. In the *Wernick* case the court rejected the contention that the provision should be construed as one for liquidated damages, saying (290 Ill. App. 573-574):

> "Although this particular clause has been a part of the rules, regulations, classifications and tariffs of the telegraph company since 1921, it has never been interpreted as a liquidated damage provision, and

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*Jacobs* v. *Western Union Telegraph Co.* (1917) 196 Mo. App. 300, 196 S. W. 31;
*Naive-Spillers Corp.* v. *Postal Telegraph-Cable Co.*, 4 Tenn. App. 435;
*Western Union Telegraph Co.* v. *Geo. F. Fish, Inc.*, (1925) 148 Md. 210, 129 Atl. 14;
*Western Union Telegraph Co.* v. *Lee* (1917) 174 Ky. 210, 192 S. W. 70;
*Ingram* v. *Hughes* (1933) 170 S. C. 1, 169 S. E. 425;
*Lynch* v. *Western Union Telegraph Co.* (1929) 224 Mo. App. 50, 18 S. W. (2d) 535.

[17] To the same effect, see
*Atkins* v. *The Disintegrating Company* (1873) 18 Wall. 272, 305-306;
*Western Union Telegraph Co.* v. *Schriver* (8th C. C. A., 1905) 141 Fed. 538.

> no cases are cited which would justify such an interpetation. * * * The fair interpretation of the provision as a whole must necessarily give effect to the plainly expressed clauses which precede and follow the so-called liquidated damage provision, stating that '*in any event, the company shall not be liable for damages* for delay, nonpayment or underpayment of this money order, whether by reason of negligence on the part of its agents, servants, or otherwise, *beyond the sum of $500* * * *, unless a greater value is stated in writing on the face of this application and an additional sum paid or agreed to be paid, based on such value, equal to one-tenth of 1 per cent thereof.' The provision, when read in its entirety, was clearly intended to fix, not a definite liability, but a maximum liability or agreed valuation upon which the rate to be paid for the shipment or carriage is to be collected'' (italics by the court).

In the *Miazza* case the plaintiff sought to recover $500 without proof of actual damage, alleging in his complaint that the provision in question is one for liquidated damages. The court sustained a demurrer, holding that the provision is not one for liquidated damages and that, if it were construed to provide for payment of $500 without proof of actual damage, it would be an invalid penalty.

It thus appears that the ruling of the court below is in conflict with an unbroken course of judicial decision. In addition to this, it is also in direct opposition to the construction given to petitioner's tariff by the Interstate Commerce Commission.

In 1910, the Interstate Commerce Act was amended to include telegraph companies (Act of June 18, 1910, c. 309, § 7, 36 Stat. 544; U. S. C. 49:1). By that amendment those companies were declared to be common carriers within the meaning of the Act and were subjected to its provisions; jurisdiction over their rates and charges was conferred upon the Interstate Commerce Commission; it was provided

that all such rates and charges should be reasonable and that any unjust rate or charge was unlawful; and it was further provided that messages might be classified into "repeated, unrepeated * * * and such other classes as are just and reasonable, *and different rates may be charged for the different classes of messages*" (U. S. C. 49:1 (5)).[18]

In May, 1916, acting under authority of the Interstate Commerce Act, as amended by the Act of June 18, 1910, petitioner filed its tariffs, including limitation of liability provisions, with the Interstate Commerce Commission. By virtue of that Act, the rates established by these tariffs were the only lawful rates on interstate and foreign messages, and the limitation of liability provisions were "a part of the rates themselves" and "the lawful condition upon which [the message] was sent."

*Western Union Telegraph Co.* v. *Priester*, supra, 276 U. S. 252, 259;
*Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, supra, 256 U. S. 566, 571;
*Unrepeated Message Case*, 44 I. C. C. 670, 675-676.

In 1917 the reasonableness of the limitation-of-liability provisions was challenged in a proceeding before the Inter-State Commerce Commission. *Unrepeated Message Case*, supra, 44 I. C. C. 670. A tariff provision substantially identical with the one involved in this case was before the Commission, except that at that time the liability was limited in the case of messages not specially valued to $50.[19] The Commission pointed out that under this provision petitioner, "within the value so placed upon the message, assumes liability to the full extent *of the loss sustained*" (44 I. C. C. at p. 675). With this construction as the basis of its decision the Commission held that peti-

[18] Pertinent provisions of the Interstate Commerce Act, as amended, are set out in Appendix A.

[19] See 44 I. C. C. at p. 672.

tioner's rates, with the restricted liability attached thereto, were lawful rates expressly sanctioned by the provisions of the Act of June 18, 1910.

Four years later, in 1921, the Commission reopened its investigation of the "rules limiting liability on the several classes of messages, dependent upon the rates paid." *Limitations of Liability in Transmitting Telegrams,* 61 I. C. C. 541. Again the same tariff provision was before the Commission[20] and again the Commission, construing this provision, said that the provision was "designed to insure the sender *against any loss within the value placed upon the message*" (61 I. C. C. at p. 543). Following this further investigation, the Commission concluded that the existing limitation of liability provisions in petitioner's rates were unreasonable, and it ordered (61 I. C. C. at p. 550)

> "* * * that the *maximum liability* in the case of a message for the transmission of which the unrepeated rate is charged should be not less than $500, and for a message received for transmission at the repeated rate, $5,000, which *limitations* we find to be reasonable *as parts of the respective rates.* Provision should be made for the transmission of valued messages under a *liability limited to the value stated in writing* by the sender of the message at the time it is offered for transmission upon payment of the repeated rate plus one tenth of 1 per cent of the stated value in excess of $5,000."

Pursuant to this order petitioner filed new message tariffs, containing a valuation clause identical in language except for the increased amount of the valuation: a clause beyond question intended, and understood by the Commission and by the public to be intended,[21] to provide for a maximum limitation of liability and nothing else (R. 59). The valuation clause in the money order tariff, which is the

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[20] See 61 I. C. C. at p. 543.

[21] See Appendix B, p. 37.

particular tariff involved here, was substantially copied[22] from the message tariff except for the amount.

The district court in this case, recognizing that its decision was in conflict with these decisions of the Commission, summarily dismissed them as "meaning little" (R. 42):

> "The fact that the Interstate Commerce Commission has not foreseen the possibility of interpreting the clause as a clause for liquidated damages *means little*. Even governmental regulatory bodies may be guilty of oversight."

In contrast, this court has held that administrative construction by the Commission "is entitled to great weight and should not be overturned except for cogent reasons[23]; and it is settled by numerous authorities that the construction of a tariff by the Commission, although not binding

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[22] The message tariff makes the sender value the message and the money order tariff makes him value the right to have the money paid; but there is no difference in the legal effect. Both clauses, like the corresponding provision in a railroad or express tariff, apply not only to cases where the articles themselves are lost, but to damages from delay, that is to say for the violation of the *right* to have the goods delivered. *S. E. Express Co.* v. *Pastime Co.* (1936) 299 U. S. 28. Even when a carrier loses goods in transit the recovery, in the last analysis, like all civil recoveries, is a recovery for the violation of a right—the right to have the goods transported safely. There was some question when the money order tariff was adopted whether the valuation of a "money order" would be held valid, since the money order—the piece of paper—can have no value, and it was thought that some court might insist that the only thing that was valuable was the right to have it paid, which had not been valued. The district court did not place the decision on the ground that any difference in language between message tariff and money order tariff justified a difference in construction, but on the ground that the Interstate Commerce Commission, in construing the message tariff as a limitation rather than a liquidation, was wrong (R. 42).

[23] *United States* v. *Chicago North Shore R. Co.* (1933) 288 U. S. 1, 13-14;
*N. Y. Central Securities Co.* v. *U. S.* (1932) 287 U. S. 12, 24.

on the courts, is a decision by a body of experts which is entitled to great weight.[24]

In the proceedings before the Commission the public was widely represented, a large number of users of the telegraph having appeared by counsel, who presented oral argument, or filed briefs, or both. The petitioner (respondent in those proceedings) clearly and unmistakably stated its own intention in framing the disputed clause, and there could have been no possible mistake or misunderstanding as to what it was supposed to mean either on the part of the Commission or of any of the interveners. This understanding is more fully shown by the excerpts from the record and briefs in the proceedings before the Commission which are printed as Appendix B.

**B. The construction given to the provision in question by the court below renders nugatory the major part of the provision, and, is, therefore, repugnant to the rule that, if possible, a construction will be adopted which gives effect to all the terms of the provision.**

Under fundamental rules of construction, the provision in question must be considered as a whole, and if possible,

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[24] "While the decisions of the Interstate Commerce Commission are not conclusive here, they are of great weight. They are especially persuasive in this highly technical field of rate construction and rate interpretation."

*Updike Grain Corporation* v. *St. Louis & S. F. Ry. Co.* (8th C. C. A., 1931) 52 F. (2d) 94, 96.

To the same effect, see:

*Empire Refining Co.* v. *Davis* (E. D. Okla., 1925) 6 F. (2d) 305, 306;

*Davis* v. *Prairie Pipe Line Co.* (8th C. C. A., 1924) 298 F. 393, 397;

*Atlantic Bridge Co.* v. *Atlantic Coast Line R. Co.* (S. D. Fla., 1932) 56 F. (2d) 163, 166 (affirmed, 57 F. (2d) 654);

*Hygrade Food Products Corp.* v. *Chicago, M., St. P. & P. R. Co.* (S. D. N. Y., 1935) 10 F. Supp. 767, 770 (reversed on other grounds, 85 F. (2d) 113).

a construction adopted which will give effect to all its terms.[25]

The first words of the clause,

> "In any event, the company shall not be liable for damages for delay, non-payment or underpayment of this money order, whether by reason of negligence on the part of its agents or servants or otherwise, beyond the sum of five hundred dollars,"

are conceded by the court below to be a "limitation of liability clause" (R. 150). They clearly provide that the company shall be liable only for actual damages up to, but not beyond, the sum of $500. Under the decision of the court below, however, these words have been rendered nugatory. If the clause has the meaning given to it by that court then recovery in *every* case, whether or not there has been any damage, must be in *the exact amount of $500* (or in such greater amount as the sender may have declared). In other words, the construction given to the provision by the court below would make it read:

> "If the company fails promptly and correctly to transmit and pay this money order, it will pay the sender $500."

This, manifestly, is an inadmissible construction.

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[25] *O'Brien* v. *Miller* (1897) 168 U. S. 287, 297;
*Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minnesota* (8th C. C. A., 1903) 121 F. 609, 611;
*Sasinowski* v. *Boston & M. R. R.* (1st C. C. A., 1935) 74 F. (2d) 628, 633.

This familiar principle has consistently been applied to the construction of tariffs.

*Wheelock* v. *Walsh Fire Clay Products Co.* (8th C. C. A., 1932) 60 F. (2d) 415, 417-418;
*Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.* (8th C. C. A., 1928) 25 F. (2d) 66, 69.

**C. The construction given to the provision in question by the court below is untenable because directly contrary to the intent of the parties.**

In construing a provision to determine whether it is one for liquidated damages, "The question always is *what did the parties intend by the language used?*"[26] This intent is ascertained by an examination of the provision itself,[27] and also, if the meaning of the language is not wholly free from doubt, by an examination of "the facts surrounding the case * * * 'Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain * * * the sense in which the parties may have used particular terms.'"[28] The provision will be construed as one for liquidated damages only if it clearly appears that the parties "fairly and understandingly" intended "to treat the sum as estimated and ascertained damages."[29]

In the case at bar neither of the parties intended to fix the sum of $500 as liquidated damages. This is clear whether the intent is sought in the "facts surrounding" the adoption of the provision, or in the words of the provision itself. Petitioner manifestly had no such intention. This appears beyond question from the history of the provision and the reasons for its adoption hereinabove set forth. It is equally clear that respondents had no intention to agree upon the sum of $500 as liquidated damages. Their understanding is unmistakably evidenced by what

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[26] *United States* v. *Bethlehem Steel Co.* (1907) 205 U. S. 105, 119;
*Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226;
*Sun Printing & Publishing Assn.* v. *Moore* (1902) 183 U. S. 642, 662, 668, 673.

[27] *Wise* v. *United States* (1919) 249 U. S. 361, 365.

[28] *United States* v. *Bethlehem Steel Co.* (1907) 205 U. S. 105, 118.

[29] *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226;
*United States* v. *United Engineering Co.* (1914) 234 U. S. 236, 241;
*Wise* v. *United States* (1919) 249 U. S. 361, 365.

they did in this case; they brought suit on the theory that they were required to plead and prove damages, and attempted, though ineffectually, to do so.

If consideration is confined to the words of the clause itself, the intent is quite as clear. The opening words of the clause show that the intent is to make the declared value the *maximum* limit of liability for damages actually sustained. In addition, the right to have the money order promptly paid is not valued at $500; it is valued at $500 *unless* a higher value is stated. Under this provision a sender may name any value he wishes—$1,000; $100,000—and the company, as a matter of law, must accept the value. If a special value is not stated, the $500 valuation is applicable—again as a matter of law—whether the money order be large or small, important or unimportant. Such a provision does not reflect an intent by both of the parties to pre-estimate and agree upon the probable damages. On the contrary, the clause itself and the circumstances surrounding its adoption "negative any notion that the parties really meant to provide a measure of compensation" (*Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 226).

**D. The construction given to the provision in question by the court below is repugnant to the rule that where one possible construction of a tariff will make it valid, and another construction will render it invalid, the former construction will be adopted.**

The Interstate Commerce Act, as amended by the Act of June 18, 1910, required that rates of telegraph companies should be just and reasonable, and declared unlawful every unjust and unreasonable rate.[30] Section 201 of the Communications Act of 1934 (48 Stat. 1070; U. S. C. 47:201) reenacted these provisions as follows:

> "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any

[30] See Appendix A, p. 31.

> such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: * * *."

As pointed out above (page 14 of this brief), the Interstate Commerce Commission, in *Limitations of Liability in Transmitting Telegrams*, 61 I. C. C. 541, ordered petitioner to establish *limitations of liability* to *maximums* of not less than $500; and these limitations were found "to be reasonable as parts of the respective rates" (61 I. C. C. at p. 550). This determination of the reasonableness of the rates was based upon the well-settled construction by the Commission of the provisions limiting liability, namely, that petitioner "within the value so placed upon the message, assumes liability to the full extent of the loss sustained" (44 I. C. C. at p. 675; 61 I. C. C. at p. 543). The Commission did not sustain as reasonable rates which include a stipulation to pay liquidated damages.[31]

It thus clearly appears that if petitioner's rates should be construed—as they have been by the court below—to include an agreement to pay $500 in every case of default in service without proof of any loss, they would be *converted into rates entirely different from those held reasonable by the Commission* and would be unlawful, not only because they would be inconsistent with the order of the Commission in *Limitations of Liability in Transmitting Telegrams, supra*, but also because they would be palpably unjust and unreasonable and thus in violation of the express provisions of the law (section 201 of the Communications Act of 1934).

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[31] Construing this order of the Commission, the court, in *Western Union Telegraph Co.* v. *Anderson* (Tex. Civ. App., 1922) 245 S. W. 731, 732, said:

> "It thus clearly appears that the Commission was not undertaking to fix a minimum of absolute liability in cases of negligence in the transmission or non-delivery of interstate messages, but a minimum below which telegraph companies could not limit their maximum liability."

The unreasonableness of petitioner's rates, as construed by the court below, is sufficiently apparent in the present case; it would be even more apparent if the case of a specially valued message were supposed. In such case a sender could tender $1 for transmission to petitioner, declare the value of his right to have this money promptly transmitted to be $100,000, and then, if he were able to prove delay or nonpayment by reason of the negligence of any one of petitioner's servants, collect $100,000 from petitioner without proof of the loss of a single cent. In this connection we may point out that the ratio of default in telegraph service, notwithstanding all the precautions that can be taken, is about 1 to 2,000, and an absolute liability for each default would put into effect a system akin to a lottery, with prizes amounting to millions of dollars annually, which no public service commission would approve.[32]

Moreover the provision, as construed by the court below, is an invalid penalty under general principles of law. An agreement to pay a fixed sum will be given effect as a provision for liquidated damages only when it is clear that the sum named is a *bona fide* pre-estimate of the probable damages which would follow a breach of contract.[33] If the

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[32] The Western Union Telegraph Company transmits each year approximately three million money orders. While it is known from experience that there will be some fault in the service in connection with about 1,500 of these, the fate of any particular money order, as a public service commission would properly regard it, is as much a matter of pure chance as the final resting place of a roulette ball. No carrier could reasonably suppose that the expenditure of vast sums in paying $500 for each default in service would be justified by any increased use of its service in the hope on the part of the senders that they would be fortunate enough to be among those whose money orders would be delayed; and even if a carrier proposed such rates, the Commission and the courts would declare, beyond doubt, that the vast sums it thus proposed to spend should rather be spent in the improvement and extension of the service or the reduction of rates.

[33] *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226;
*United States* v. *United Engineering Co.* (1914) 234 U. S. 236, 241;
*Wise* v. *United States* (1919) 249 U. S. 361, 365.

agreement is "to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach," it is an unenforceable penalty.[34]

As construed by the court below, the clause provides for payment of $500 in every case, regardless of circumstances, where petitioner fails promptly to transmit and pay the money. This is a penalty. In *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 522-523, 178 S. E. 764, the court, so ruling, said:

> "Agreements to pay fixed sums as damages for breaches of contracts, where the amount plainly has no reasonable relation to any probable actual damage which may follow a breach, will not be enforced for the agreed amount as liquidated damages, but will be construed as mere unenforceable provisions for penalties. [Cases]
>
> "Since the petition and its exhibits plainly indicate that the amount printed in the ordinary printed blank form of the telegraph company as the value of the plaintiff's right to have the money promptly and correctly transmitted and paid to the addressee did not represent any bona fide effort between the parties to fix in advance the actual damage to the plaintiff from any breach of the contract by the defendant, but since the petition and the exhibits show that the stipulation contained in the usual printed form represented no more than an attempt to set up a fixed and uniform penalty for any and all breaches of the contract without any reference to the facts or circumstances or the actual damages sustained, such a provision will not support an action for a failure to perform the contract."

It follows from the foregoing that the construction adopted by the court below is untenable because repugnant

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[34] *Kothe* v. *R. C. Taylor Trust* (1930) 280 U. S. 224, 226; *Miazza* v. *Western Union Telegraph Co.* (1935) 50 Ga. App. 521, 178 S. E. 764, 765.

to the settled rule that where one possible construction of a tariff will make it valid, and another construction will render it invalid, the former construction will be adopted.

*Great Northern Ry.* v. *Delmar Co.* (1931) 283 U. S. 686, 690-691.[35]

That it is "possible" to construe the provision in petitioner's tariff as a lawful limitation of liability and not as an invalid stipulation for liquidated damages is surely not debatable, in view of the fact that the former construction has been uniformly adopted by the courts and by the Interstate Commerce Commission during the many years in which the provision has been in force.[36]

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[35] Other cases in accord are:

*Hobbs* v. *McLean* (1886) 117 U. S. 567;
*Ewing* v. *Howard* (1868) 7 Wall. 499;
*Tyson* v. *Moore* (5th C. C. A., 1937) 92 F. (2d) 741;
*Intermountain Building & Loan Ass'n* v. *Gallegos* (9th C. C. A., 1935) 78 F. (2d) 972, 981.

[36] Such, also, is the construction which uniformly has been given to the provision by petitioner and its patrons. A provision substantially identical with that here involved has been in petitioner's tariffs for more than twenty-nine years. During these years, millions of customers have sent messages and money orders, and thousands of claims have been filed. In only *one* case (*Miazza* v. *Western Union Telegraph Co.*, supra, pp. 12, 22 of this brief) has any patron ever made a claim or brought suit against petitioner upon the theory that the provision constitutes an agreement to pay $500 without proof of loss. In this connection it should be noted that in the case at bar the point was raised by the trial court, not by the respondents; and in *Wernick* v. *Western Union Telegraph Co.*, supra, pp. 11, 12 of this brief, the complaint alleged special damages and was drafted upon the theory that plaintiffs could recover only such damages as they could prove were actually sustained by them. (See the opinion of the court, and the concurring opinion, 9 N. E. (2d) 74, 75.)

**E. The courts below misconstrued and misapplied the decisions of this court in *Western Union Telegraph Co.* v. *Czizek* (1924) 264 U. S. 281, and *Sun Printing & Publishing Assn.* v. *Moore* (1902) 183 U. S. 642.**

The court below erroneously construed the provision in question as containing two completely separate and unrelated clauses (R. 149-151). In support of this ruling it said that this court, in the *Czizek* case, adverted to the "distinction between the two clauses" as follows (264 U. S. 281, 285):

> "We have not adverted to the first clause of the exemptions, limiting liability to the amount received for sending the message. Obviously this has a narrower scope than the valuation clause and we should hesitate to hold that it exonerated the defendant in this case * * *."

This is a plain misapplication of the decision of this court. The tariff involved in the *Czizek* case *did* contain two separate clauses, which we quote in the footnote;[37] but only *one* of the separate clauses referred to in that case is contained in the tariff covering the money order involved in the case at bar. When this court referred to the distinction

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[37] "1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated telegram, beyond the amount received for sending the same nor for mistakes or delays in the transmission or delivery, or for the non-delivery, of any repeated telegram beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for non-delivery of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of Fifty-Dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one percent. thereof" (264 U. S. 281, 283; 276 U. S. 252, 257).

between the two clauses in the *Czizek* case, it referred to the distinction between *separate* clauses 1 and 2. It held clause 2 (the clause here involved) applicable and treated it as one indivisible clause under which petitioner's liability is "limited" to the amount of the declared value (264 U. S. 281, 286).[38]

Both courts below also misapplied the *Sun Printing & Publishing* case (R. 26, 41, 151). That case involved an ordinary contract—not a limitation-of-liability provision in the tariff of a telegraph company which, as matter of law, is a part of the established rates (*Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252, 259). In the *Sun Printing & Publishing* case the intent of the parties to provide for liquidated damages was clear; in the present case such intent is entirely lacking. In the former case, as this court pointed out, the parties agreed *bona fide* upon the actual value of the yacht, and intended "to treat the sum named as estimated and ascertained damages for a breach of the covenant to return the yacht" (183 U. S. 668). **If the charterer had thought that the yacht was not worth $75,000, he could have insisted that the valuation be reduced or be dispensed with entirely, or he could have refused to hire the yacht. Petitioner's position under the provision in the case at bar is totally different. It cannot refuse a money order; it cannot dispense with the valuation; it cannot alter the valuation—no matter how high, or how arbitrary, under the circumstances, the value may appear.**

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[38] While it is not pertinent to the question involved in the case at bar, it may be noted that this court, in the *Czizek* case, held clause 1 inapplicable for the following reason: That case involved an unrepeated message. At the time of the decision, many courts had held that clause 1 (as it then read) was not intended to apply to the sort of default in service which repetition would not have prevented. The message in the *Czizek* case was never sent from the office of origin, and was, therefore, in this class.

## II

**Even if it could be assumed that the court below was correct in its ruling that the provision in question was intended as one for liquidated damages, it nevertheless should not have enforced the provision until its validity, as so construed, had been passed upon by the Federal Communications Commission.**

What has been said establishes beyond question that the court below misconstrued the limitation-of-liability provision in petitioner's tariff. But even if the inadmissible assumption were made that the provision was intended to have the meaning attributed to it by the court below, still, we submit, that court should not have enforced the provision until its validity as so construed had been passed upon by the Federal Communications Commission. The question of the reasonableness and legality of petitioner's rates, including the provisions limiting liability, is subjected by the Communications Act of 1934 to the administrative authority of the Federal Communications Commission (see Appendix A, p. 34). Under the principles recently laid down by this court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, decided January 2, 1940, No. 129, October Term, 1939, the court below, if it were of the opinion that petitioner's tariff contained a provision for the payment of $500 in every case of default in service regardless of loss, should have stayed its hand, while retaining jurisdiction of the case, pending a determination by the Commission of the lawfulness and reasonableness of the tariff as so construed.

III

**The judgment cannot be sustained on the theory that plaintiffs proved an actual loss of $500 or more.**

The money order in question, for $150, was sent on September 1, 1937 by the plaintiff Nester from Los Angeles to the plaintiff Charles in Honduras in order to pay the charges on certain mining equipment which had been shipped to Honduras for use at a mine which plaintiffs were operating under a lease. If the defendant had properly performed its contract, the money should have been paid on September 3, 1937, but it was not tendered to the payee until some time between September 28th and October 7th (R. 94). The plaintiffs contend that as a direct result of the breach (1) they lost their mining leasehold and (2) the shipment, of the value of $500, was forfeited. There was no serious attempt to prove the first item. The district court said there was no evidence to substantiate the claim that the failure of this small sum of money to arrive early in September was responsible for the loss of the lease (R. 25), and the court of appeals said there was no proof of "any damages except the value of the confiscated shipment, which was $500". As to the confiscation of the shipment, the burden was clearly on the plaintiffs to show the date when the forfeiture occurred; for in the absence of such proof there is nothing to show that it did not occur before September 3rd, or so much later that the plaintiffs, by reasonable diligence, might have obtained the necessary funds in another way. See *Barrett* v. *Van Pelt*, (1925) 268 U. S. 85, 92.

Although it appeared that the witness Charles, one of the plaintiffs, had in his possession "a written statement from the authorities telling me that the goods were confiscated as of a particular date" (R. 121), the plaintiffs carefully refrained from introducing any proof as to this

date; and there was therefore no evidence whatever that there was any connection between the breach of contract and the loss of the goods. The district court stated plainly that the loss of the goods "cannot be traced to the non-delivery of the money" (R. 25); and its finding of fact (R. 47) that by reason of the failure to pay the money promptly "the plaintiffs have suffered and sustained damages, loss and injury, in the sum of $500" was either a conclusion of law, based on its erroneous construction of the tariff provision, or, if considered as a true finding of fact, entirely without evidence to support it.

The court of appeals did not pass on the sufficiency of the proof as to the cause of the forfeiture, but assumed, without deciding, that defendant's contention about it was correct. The point is however so plain that no further litigation about it should be necessary. Even if there had been any causal connection between the failure to pay the money and the forfeiture, the rule has always been that a telegraph company, quite apart from any limitations of liability in its tariffs, is responsible only for such losses as it could reasonably have contemplated,[39] and no special notice of the purpose of this money order was alleged or proved. All the telegraph company knew was that Nester wished to send $150 to Charles (R. 52, 106). The district court thought (R. 23, 24) that this rule did not apply because the complaint was "framed" in tort, and erroneously applied to it the provision of the California civil code that a person injured by the tort of another may recover losses whether they can be anticipated or not. But even if this is the State law it is inapplicable to an interstate or foreign message under the rule of equality and uniformity, and the Federal rule (like the rule in most States) has always been that where the foundation of the claim is a mere non-feasance, i. e., a simple failure to perform a duty under-

[39] *Primrose* v. *W. U.* (1894) 154 U. S. 1; and the many cases collected in 62 C. J. 230, 231, note 63.

taken by contract, there is no significance in the distinction between actions "sounding" in contract and those "sounding" in tort.[40]

The right of the plaintiffs to recover in another action the principal sum of $150.00 paid to the defendant was expressly reserved by the district court (R. 48).[41] This of course would include the right to recover interest. It follows that the judgment of the circuit court of appeals should

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[40] *Western Union Telegraph Co.* v. *Hall* (1923) 287 F. 297;
*Ferrerro* v. *Western Union Telegraph Co.* (1896) 9 App. D. C. 455, 35 L. R. A. 548;
*Kerr S. S. Co.* v. *Radio Corporation* (1927) 245 N. Y. 284, 157 N. E. 140, 55 A. L. R. 1139;
62 C. J. 231, note 66.

In the *Kerr S. S. Co.* case, *supra*, the court, speaking through Judge CARDOZO, said (157 N. E., p. 142):

> "The plaintiff makes the point that the action is one in tort for the breach of a duty owing from a public service corporation, and that the rule of Hadley *v.* Baxendale does not protect the carrier unless sued upon the contract. There is much authority the other way. Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883; Western Union Tel. Co. *v.* Hall (C. C. A.) 287 F. 297; Bertuch *v.* United States & Hayti Telephone & Cable Co., 79 Misc. Rep. 10, 15, 139 N. Y. S. 289; Fitch *v.* Western Union Tel. Co., 150 Mo. App. 149, 130 S. W. 44; Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Newsome *v.* Western Union Tel. Co., 153 N. C. 153, 69 S. E. 10; cf. 3 Hutchinson on Carriers, §§ 1360, 1367, 1368, 1370. Though the duty to serve may be antecedent to the contract, yet the contract when made defines and circumscribes the duty. * * * As it is, there is little trace of a disposition to make the measure of the liability dependent on the form of action. A different question would be here if the plaintiff were seeking reparation for a wrong unrelated to the contract, as e. g., for a refusal to accept a message or for an insistence upon the payment of discriminatory rates. * * * Upon the acceptance of the message the defendant's duty was to deliver it in accordance with the contract, and the damages recoverable for nonperformance of the contract are the damages recoverable for nonperformance of the duty."

[41] As a matter of fact plaintiffs tendered the $150.00 to the respondents in July, 1938 (R. 79, 98-00), and since the trial refund has been made.

be reversed and the cause remanded with instructions to enter judgment for respondents for nominal damages only.

## CONCLUSION.

**For the reasons herein stated we respectfully submit that the judgment of the circuit court of appeals is erroneous and should be reversed and the cause remanded with instructions to enter judgment for the plaintiffs for nominal damages only.**

Dated: San Francisco, California,
February 14, 1940.

Respectfully submitted,

FRANCIS R. STARK
ALFRED SUTRO
OSCAR LAWLER
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# APPENDIX A

## APPLICABLE PROVISIONS OF THE INTERSTATE COMMERCE ACT AND OF THE COMMUNICATIONS ACT OF 1934.

By the Act of June 18, 1910 (44 Stat. 539, 544, et seq.), the Interstate Commerce Act was amended to include telegraph companies. They remained subject to the Interstate Commerce Act, and to the jurisdiction of the Interstate Commerce Commission, until the enactment of the Communications Act of 1934 (48 Stat. 1064).

The provisions of the Interstate Commerce Act pertinent to the case at bar, as they read prior to the enactment of the Communications Act of 1934, are as follows (U.S.C. 49:1, et seq.):

"Section 1. (1) The provisions of this chapter shall apply to common carriers engaged in—

• • • • • • • •

(c) The transmission of intelligence by wire or wireless from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

• • • • • • • • •

(3) The term 'common carrier' as used in this chapter shall include • • • telegraph, telephone, and cable companies operating by wire or wireless; • • •.

• • • • • • • • •

(5) All charges made for any service rendered or to be rendered in the transportation of passengers

or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: * * *.

* * * * * * *

Section 15. (1) Whenever, after full hearing, * * * the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier * * * for the transmission of messages * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, * * *."

The provisions of the Communications Act of 1934, pertinent to the case at bar, are as follows (U. S. C. 47:151, et seq.):

"Section 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio * * * and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law

to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Section 152. (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio . . .

. . . . . .

Section 201.

. . . . . .

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: . . .

. . . . . .

Section 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting

such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

* * * * * * *

Section 205.

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for inves-

tigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, and maximum and minimum, charge or charges to be thereafter observed and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * * * *

Section 602.

* * * * * * *

(b) The provisions of Chapter 1 of Title 49 [the Interstate Commerce Act], insofar as they relate to communication by wire or wireless, or to telegraph, telephone, or cable companies operating by wire or wireless, except the last proviso of section 1 (5) and the provisions of section 1 (7), are repealed.

* * * * * * *

Section 603.

* * * * * * *

(b) There are hereby transferred to the jurisdiction and control of the Commission * * * (2) all records under the jurisdiction of the Interstate Commerce Commission * * * relating to the duties, powers, and functions imposed upon and vested in the Commission by this Act.

* * * * * * *

Section 604. (a) All orders determinations, rules, regulations, permits, contracts, licenses, and privileges which have been issued, made, or granted by the Interstate Commerce Commission, • • • under any provision of law repealed or amended by this Act or in the exercise of duties, powers, or functions transferred to the Commission by this Act, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law."

# APPENDIX B

**Excerpts from record and briefs in proceedings before the Interstate Commerce Commission in first unrepeated message case, 44 I. C. C. 670, and second unrepeated message case, 61 I. C. C. 541 showing the construction placed on the valuation clause by the carrier, the Commission, and the public.**

(1)

Excerpts from the Western Union's answer in the first unrepeated message case:

> "It is true that the respondent has initiated and established, as under the act to regulate commerce it is its right and duty to do, certain classifications of messages providing for limitations of liability, which are now and for some time past have been on file with this honorable Commission, and which, so far as material in the present proceeding, are two: the limitation of liability for unrepeated messages to the amount received for sending the same, and *the limitation of liability* in all cases, whether the messages are repeated or not, to fifty dollars, unless a higher valuation is expressed and a small additional sum paid to cover the increased risk.
>
> • • • • • • •
>
> In order to provide therefore for the cases in which the unrepeated message stipulation is of no avail, and to guard against possible liability for enormous damages, the respondent, some years before the passage of the Act of Congress approved June 18, 1910, namely, during the year 1909, established and promulgated, and has since filed with this Commission its classification of messages into those with reference to which no value is stated and those which are valued at more than fifty dollars. *Respondent says that this classification was modeled on the similar classifications which theretofore had generally been sustained in the case of bills of lading and express receipts,* and respondent respectfully submits *that what is reasonable in the case of express companies and other carriers of goods should with even*

*better reason be sustained in the case of telegraph companies.*

* * * * * * *

Entirely apart from the stipulations limiting respondent's liability for unrepeated messages and for messages not specially valued, the claim of the complainants in this case is entirely devoid of any legal merit."

(2)

Excerpts from Western Union's brief in first unrepeated message case:

"* * * in order to provide for the cases in which the unrepeated message stipulation is of no avail, and to guard against possible liability for enormous damages, the respondent, some time before the passage of the Act of Congress approved June 18, 1910, namely, during the year 1909, established and promulgated, and has since filed with the Commission, its classification of messages into those with reference to which no value is stated and those which are valued at more than fifty dollars; *which classification was modeled on the similar classifications which theretofore had generally been sustained in the case of bills of lading and express receipts.*

* * * * * * *

"* * * the limitation of fifty dollars is far in excess of the money loss which is likely to result from any possible default in connection with the handling of the *average* message, or with the handling of more than twenty-five per cent. of all telegraph messages."

(3)

Excerpts from oral argument of counsel for Western Union before the Interstate Commerce Commission in the first unrepeated message case (Docket 8917, Dec. 10, 1920):

"The sender of a message can pay the ordinary unrepeated message rate under the agreement that there shall be no liability beyond the amount received for sending the message if it goes wrong, or he can pay one-half additional, to have the message re-

peated, and *he can recover for the actual loss*, not to exceed fifty times the amount paid for sending the message, *with a limitation that it shall not be more than $50*, and, finally, if he wishes full protection he can state what he thinks the message is worth and what he thinks his loss will be if it is not transmitted and delivered and he can secure absolute and full protection up to $1,000,000 or $2,000,000.

* * * * * *

Commissioner AITCHISON: Now, take the case of non-feasance, if the gentleman gave you a message and you failed to deliver it, what has repetition to do with it?

Mr. STARK: It has nothing to do with it. That is the very reason we need a valuation agreement for rate-making purposes * * *.

* * * * * *

If you do away with the classification of messages based on value, it would mean that in a large, a very large fraction of our messages, we would have no limitations at all."

(4)

Excerpts from the report of the commission in the first unrepeated message case, 44 I. C. C. 670, 672, 675, 676, 679:

"Then followed certain other provisions (set out in the footnote) which have always been interpreted by the defendant as limiting its liability for such an error in the transmission of an unrepeated message, as was made in this instance, to the nominal sum of *fifty dollars as a maximum* together with the return of the toll paid upon the message. That was its contention in the trial court as before stated and the same defense is made here. Apparently the claimants do not deny that this was the intended purpose and meaning of those provisions, or that the different charges for repeated and unrepeated messages with the restricted liability attached to them had long been in effect * * *

* * * * * *

The higher rate for repeated messages, concurrently maintained for many years with the unre-

peated rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make *good any damages incurred,* through error or delay in the transmission or delivery of the message, to the extent of fifty times the rate charged, *with a maximum of $50.* For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of 1 per cent of the amount of the assurance desired, the defendant, *within the value so placed upon the message,* assumes liability *to the full extent of the loss sustained.* The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

* * * * * * *

"In the case of a telegram, if the carrier is to assume the same degree of risk that is assumed by the express company under similar circumstances, the rate demanded is the repeated message rate, under which the liability of the carrier is *limited* to the sum of $50, unless a greater value is declared.

* * * * * * *

"Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions, and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that

neither the interstate rates of the defendant nor the rules, practices, conditions, and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful."

(5)

Excerpt from tentative report prepared by the examiner in second unrepeated message case, 61 I. C. C. 541:

"Upon a review of the evidence, it is recommended that the Commission find that the present rates for the transmission of unrepeated interstate messages should be conditioned on a restriction of liability for errors, delays or other faults in the service to the *maximum sum* of $50, and for repeated messages to the *maximum sum of $150.*"

(6)

Excerpts from brief and argument filed in second unrepeated message case on behalf of the Joint Council of the National League of Commission Merchants for the United States, the International Apple Shippers' Association and the Western Fruit Jobbers' Association of America, interveners (page 5):

"The immediate problem before the Commission in this case as the Joint Council sees it is to *so revise the limitations of liability now in use* as to afford commercial users of telegrams in their daily business a right to hold telegraph companies responsible for the full result of mistakes and unreasonable delays, the failure to deliver messages sent at the normal commercial rates, and at the same time to protect the companies against unjust claims including fake claims and those of the mental anguish type."

(7)

Statement by Fayette B. Dow, Esq., attorney for the above-named interveners, made before the examiner in the same proceeding, quoted in their brief (page 11):

"It has had that effect, in a sense, because the Supreme Court has held, and made it the Federal

rule, at least, that the *contractual limitations of liability on the telegraph blanks are not void, but are reasonable in principle,* because they attempt to classify messages with respect to varying degrees of service for which different rates may be charged; and it is going to be our position in this case that the—what you might call—incidental application of the discrimination sections of the act to regulate commerce ought not to place a restriction upon the recovery for failure to deliver messages, for example, which did not exist at the time the amendment was passed in 1910."

(8)

Excerpt from brief filed in same proceeding on behalf of the National Industrial Traffic League (page 5):

"* * * the sum of $50 is wholly inadequate as a *maximum liability* * * *."

(9)

Excerpt from brief submitted by Clare J. Hall, Esq., on behalf of intervener Ernest L. Wellman, in the same proceeding (page 29):

"I cannot agree with the opinion of Examiner Pattison that the restriction of liability on unrepeated messages should be limited to a *maximum sum* of $50.00 and for repeated messages to the *maximum sum* of $150.00."

(10)

Excerpts from brief filed in same proceeding on behalf of the Board of Trade of Chicago and twenty-five other interveners (pages 26, 35):

"Such contracts for limitations are upheld because they are practical and reasonable as applied to freight, express matter and baggage.

* * * * * * *

"Hence this valuation theory, as applied to telegraph messages is not a reasonable limitation, because it is not a fair or practical one."